Supreme Court, U.S.
FILED

001432 MAR 14 2001

OFFICE OF THE CLERK

No.

In the

# Supreme Court of the United States

METRO COMMUNICATIONS COMPANY,

*Petitioner,*

*versus*

AMERITECH CORPORATION, AMERITECH MOBILE COMMUNICATIONS, INC. and DETROIT SMSA LIMITED PARTNERSHIP,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

KENNETH B. MORGAN
COUNSEL OF RECORD

K. DINO KOSTOPOULOS
**MORGAN & ASSOCIATES, P.C.**
165 N. OLD WOODWARD AVENUE
BIRMINGHAM, MICHIGAN 48009
(248) 594-6340
*Attorneys for Petitioner*

Curry & Taylor (202) 393-4141 usscupremecourt@hotmail.com

48 pp

## QUESTIONS PRESENTED

1. Whether a party, who (over objection) obtained an expressly limited judgment in an initial action, may use that limited judgment to establish the foundational element of the defense of *res judicata* and cause the anomalous result of permitting one set of parties to a subsequent proceeding (Respondents) to litigate all their previously un-adjudicated claims while simultaneously precluding the other party (Petitioner) from litigating its un-adjudicated claims?

2. Whether all of the Petitioner's claims were properly dismissed by the District Court as compulsory counterclaims pursuant to Rule 13(a) of the Federal Rules of Civil Procedure where: a) they arose from a different transaction or occurrence than the transaction or occurrence which formed the basis of the complaint in the relevant prior action; b) by the relevant contract established that not all the Petitioner's claims had fully matured as of the date of the answer to the complaint in the relevant prior action; and c) prior to the filing of the complaint in the relevant prior action there were two "prior pending actions" arising out of the same contractual relationship?

3. Whether the doctrine of judicial estoppel permits a party to successfully maintain in one proceeding that its trademark claims, while conceptually related to the parties Agency Agreement, did not arise out of the "same transaction or occurrence" as then-pending state court proceedings merely because both the state court and federal court actions had a common contractual heritage; to later maintain the opposite legal position and to employ these diametrically opposed positions to obtain the benefit of the doctrine of *res judicata* and of Rule 13(a) of the Federal Rules of Civil Procedure and preclude the adjudication on the merits of Petitioner's un-adjudicated non-trademark claims?

## PARTIES TO THE PROCEEDING

Petitioner

Metro Communications Company, Inc. Metro Communications Company, Inc., has no parent company nor any subsidiaries and no publicly held company owns 10% or more of the corporation's stock.

Respondents

Ameritech Corporation, Ameritech Mobile Communications, Inc. and Detroit SMSA Limited Partnership, a Michigan limited partnership of which Ameritech Mobile Communications, Inc. is general partner.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... iv

OPINION BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

STATUTES INVOLVED ..... 1

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 10

I. THE PETITION SHOULD BE GRANTED SO THE COURT MAY INSTRUCT THE LOWER COURTS AS TO WHETHER, AND IF SO TO WHAT EXTENT, A PARTY IS ENTITLED TO ASSERT THE DOCTRINE OF *RES JUDICATA* AS A DEFENSE WHEN A COURT HAS EXPRESSLY LIMITED THE SCOPE OF THE UNDERLYING JUDGMENT BY A DISMISSAL WITHOUT PREJUDICE OF A PORTION OF THE CLAIMS ORIGINALLY ASSERTED IN THE COMPLAINT. ..... 10

II THE PETITION SHOULD BE GRANTED TO ADDRESS THE PROPER APPLICATION OF RULE 13(a), FEDERAL RULES OF CIVIL PROCEDURE IN THE CONTEXT OF MULTIPLE PENDING ACTIONS BETWEEN PARTIES BASED INVOLVING DISTINCTLY DIFFERENT SUBJECT MATTER, BUT

WHICH INVOLVE A COMMON CONTRACTUAL HERITAGE. ..... 14

III. THE PETITION SHOULD BE GRANTED TO ADDRESS THE DOCTRINE OF JUDICIAL ESTOPPEL AND DETERMINE WHETHER THAT DOCTRINE PERMITS A PARTY TO TAKE LEGAL AND FACTUAL POSITIONS THAT ARE INCONSISTENT WITH ONES SUCCESSFULLY TAKEN BY THAT PARTY IN A PRIOR ACTION INVOLVING THE SAME QUESTIONS OF LAW. ..... 17

CONCLUSION ..... 18

APPENDIX

**Appendix A**-Sixth Circuit *per curiam* opinion, 12/14/00 ....1a

**Appendix B**-District Court order granting defendants' motion to dismiss, 02/22/99 .....3a

**Appendix C**-District Court order denying motion for reconsideration, 05/03/99..... 13a-14a

**Appendix D**-District Court order directing entry of final judgment pursuant to Rule 54(b), 10/15/99 .....16a

**Appendix E**-District Court stipulation and order staying Wayne County, Michigan Circuit Court Action No. CA-95-518972-CK pending final resolution of federal action, 02/18/99 .....21a

# TABLE OF AUTHORITIES

## Cases

ANSWERING SERVICE, INC. v. EGAN, 234 U.S. APP. D.C. 266, 728 F.2D 1500, 1503 (D.C.CIR. 1984) ..... 14
CHAPPELLE v. BEACON COMMUNICATIONS, INC., 84 F.3D 652, 653 (2ND CIR. 1996) ..... 11
CHRYSLER MOTORS CORP. v. THOMAS AUTO CO., 939 F.2D 538 (8TH CIR. 1991) ..... 12
COLORADO RIVER CONSERVATION DISTRICT v. UNITED STATES, 424 U.S. 800, 96 SUP. CT. 1236, 47 L. ED.2D 483 (1976) ..... 6
COOK v. ROCKY MOUNTAIN BANK NOTE CO., 974 F.2D 147, 148 (10TH CIR. 1992) ..... 11
COOTER & GELL v. HARTMARX CORP., 496 U.S. 384, 110 L. ED. 2D 359, 110 S. CT. 2447 (1990) ..... 11
DANNENBERG v. SOFTWARE TOOLWORKS, INC., 16 F.3D 1073, 1078 (9TH CIR. 1994) ..... 11
DIVISION 241 AMALGAMATED TRANSIT UNION v. SUSCY, 538 F.2D 1264, 1266 & N.1 (7TH CIR. 1976), CERT. DENIED, 429 U.S. 1029 (1976) ..... 12
DUBOSE v. MINNESOTA, 893 F.2D 169, 171 (8TH CIR. 1990) ..... 12
EDWARDS v. AETNA LIFE INSURANCE CO., 690 F.2D 595, 598-99 (6TH CIR. 1982) ..... 17
FASSETT v. DELTA KAPPA EPSILON, 807 F.2D 1150, 1155 (3RD CIR. 1986), CERT. DENIED, 481 U.S. 1070 (1987) ... 11
JTC PETROLEUM CO. v. PIASA MOTOR FUELS, INC., 179 F.3D 1073 (7TH CIR. 1999) ..... 12
KIRKLAND v. NATIONAL MORTGAGE NETWORK, INC., 884 F.2D 1367 (11TH CIR. 1989) ..... 13
MESA v. UNITED STATES, 61 F.3D 20,22 (11TH CIR. 1995). 12
METRO COMMUNICATIONS COMPANY, INC. v. AMERITECH, 984 F.2D 739 (6TH CIR. 1993) ..... 4
REYNOLDS v. COMMISSIONER OF INTERNAL REVENUE, 861 F.2D 469, 472-73 (6TH CIR. 1988) ..... 17

RYAN V. OCCIDENTAL PETROLEUM CORP., 577 F.2D 298, 302-03 (5TH CIR. 1978) ..... 11
SCARANO V. CENTRAL R.R., 203 F.2D 510, 513 (3RD CIR. 1953) ..... 17
SOUTH AUSTIN COALITION COMM. COUNCIL V. SBC COMMUNICATIONS, INC., 191 F.3D 842 (7TH CIR. 1999). 12
STATE TREASURER V. BARRY, 168 F.3D 8, 10-13 (11TH CIR. 1999) ..... 12
STUDSTILL V. BORG WARNER LEASING, 806 F.2D 1005, 1008 (11TH CIR. 1986) ..... 13
TELEDYNE INDUS., INC. V. NAT'L LABOR RELATIONS BD., 911 F.2D 1214, 1217 (6TH CIR. 1990) ..... 17
UNITED STATES V. KAUFMANN, 985 F.2D 884, 889 ..... 12

MISC.

15 U.S.C. §1114 ..... 5
28 U.S.C. §§1254(1) ..... 1
28 U.S.C. §1291 ..... 12
Fed.R.Civ.P. 13(a) ..... 9, 10
Fed.R.Civ.P. 41(a) ..... 9

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported but is found in the appendix at Appendix A at 1a-2a. The following orders of the District Court for the Eastern District of Michigan, Southern Division are also included in the Appendix: Order of February 22, 1999 granting defendants' motion to dismiss (App. B at 3a-12a); Order of May 3, 1999 denying motion for reconsideration (App. C at 13a-14a); Order of November 15, 1999 directing entry of final judgment pursuant to Rule 54(b) (App. D. at 15a-18a); and Stipulation and Order of February 18, 1999 staying Wayne County, Michigan Circuit Court Action No. CA-95-518972-CK pending final resolution of federal action. (App. E. at 19a-22a).

## JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its *per curiam* Opinion on December 14, 2000. No petition for rehearing was sought.

The jurisdiction of this Court is invoked under to 28 U.S.C. §§1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 13(a), Federal Rules of Civil Procedure

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the

court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 41(a), Federal Rules of Civil Procedure

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

## STATEMENT OF THE CASE

As indicated above, there are three (3) sets of issues in this case: 1) whether a litigant is entitled to assert the doctrine of *res judicata* to achieve a broad preclusive effect when the scope of the allegedly final judgment upon which the defense is premised was expressly limited by the District ? 2) whether Rule 13(a) of the Federal Rules of Civil Procedure is applicable to preclude claims that did not arise from the same transaction or occurrence as the complaint in the relevant prior action; where at the time the complaint in the relevant prior action was filed there were then two (2) then-pending state court actions between the parties arising from the same contract; and, in any event, by the express terms of the relevant contract not all of the supposedly compulsory counterclaims had fully matured at the time the answer to the complaint in the relevant prior action was filed? and 3) the effect of the doctrine of judicial estoppel upon a party's attempt to employ diametrically opposed legal "positions" for the purpose of obtaining contradictory judicial rulings as to the same legal question involving the same parties and claims. The following brief statement of the factual procedural history of the several actions between the parties to this matter is necessary to resolve these issues.

### Background of the Case

Petitioner Metro is a former "authorized agent" of Respondent Detroit SMSA Limited Partnership ("SMSA"), which, itself, is one of two (2) owners of cellular radio service licenses issued by the Federal Communications Commission for operation within the Detroit Metropolitan area. Respondent Ameritech Mobile Communications, Inc. ("AMCI"), and, in turn, its parent corporation, Respondent Ameritech Corporation ("Ameritech"), a so-called Regional Bell Operating Company, control SMSA and its marketing activities regarding cellular phone service. AMCI is the

managing general partner of SMSA, and both AMCI and SMSA are affiliates of Ameritech.

In 1984, and again in 1988, Metro and SMSA entered into an agency agreement under which Metro distributed so-called "Ameritech" cellular service. (The "Agency Agreement").

In 1990, Metro joined two (2) other agents in an anti-trust action commenced in the Eastern District of Michigan. *Metro Communications Company, Inc. v. Ameritech,* No. 90-CV-70184-DT (E.D. Mich. Jan 23, 1990). In 1992, Judge Gerald R. Rosen granted summary judgment for Ameritech, and in 1993 the Sixth Circuit Court of Appeals affirmed his decision. *Metro Communications Company, Inc. v. Ameritech,* 984 F.2d 739 (6th Cir. 1993).

In April 1993, Metro gave notice to SMSA and AMCI that Metro intended to exercise an option to extend the Agency Agreement for 12 months. Absent that extension, the agreement expired on December 31, 1993.

In June 1993, SMSA demanded that Metro pay attorneys' fees allegedly due under the terms of the Agency Agreement. These were claimed to be owed under the Agency Agreement because of the anti-trust action. Metro was given 30 days to pay this amount under penalty of termination of the Agency Agreement. Metro disputed that these fees were owed because, among other reasons, no fees were sought at the conclusion of the anti-trust action and, in Metro's view, the terms of the Agency Agreement provided for the payment of attorneys' fees only if SMSA and AMCI prevailed on certain types of claims, but did not require payment of fees under the circumstances related to the anti-trust action.

In response, in July 1993, Petitioner Metro commenced an action for declaratory relief in the State of Michigan's 6th Judicial Circuit (the "Oakland County Action"). While the Oakland County Action remained pending, Respondents AMCI and SMSA"- but not Ameritech - commenced a separate action against Petitioner Metro for claim and delivery in the State of Michigan's 3rd Judicial Circuit (the "Original Wayne County Action").

On December 31, 1993, the last of the agency agreements between Metro and SMSA expired.[1]

While both the Oakland County Action and the Original Wayne County Action were pending, AMCI and Ameritech -- but not SMSA -- commenced a third action, this to enforce trademark rights against Petitioner Metro and its sole shareholder, in the United States District Court for the Eastern District of Michigan (the "Prior Federal Action"). On June 6, 1994, Respondents commenced an action against Petitioners in the United States District Court for the Eastern District of Michigan, Southern Division. The gravamen of the complaint was that, by being involved in any manner in the distribution of so-called Ameritech cellular phone service after expiration of the agency agreement, Petitioner had violated Respondents' trademark rights and should be held liable for such violations pursuant to the Lanham Act. 15 U.S.C. §1114. Respondents claimed both trademark infringement and unfair competition related to allegedly false statements of affiliation. The facts alleged in the Prior Federal Action complaint demonstrate that the claims asserted there did not relate to any aspect of the parties' relationship or rights other than the post-December 31, 1993

[1]The events surrounding the expiration of the agency agreement have been, and remain, the subject of other pending state court actions. However, for purposes of these proceedings, and without waiver of Respondents' rights in those actions, the agency agreement has been treated as having expired on December 31, 1993.

sales and the trademark issues. Moreover, SMSA was not a party.

At the onset of the Prior Federal Action, Metro asked the District Court to abstain under the *Colorado River* Doctrine. *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 Sup. Ct. 1236, 47 L. Ed.2d 483 (1976). In the alternative, Metro sought compulsory joinder of SMSA in the Prior Federal Action. AMCI and Ameritech both opposed abstention and joinder on the grounds that the Prior Federal Action did not arise from the same transaction or occurrence as the state court proceedings and that SMSA was not a party to the Prior Federal Action, thereby destroying the "identity of claims" required for abstention. The District Court denied Metro's motion and the action proceeded without SMSA while state court proceedings remained pending.

As part of the Agency Agreement, Metro was, and remains, entitled to payment of two (2) types of commissions following expiration of the term. First, Metro was and is entitled to pre-expiration activation commissions. Second, Metro was and is entitled to "maintenance" or "residual commissions." These are amounts to be paid to an agent after expiration of the agency agreement and related to the various accounts activated by that agent during the term of the agreement.

After the expiration of the Agency Agreement, Metro had sought payment of the outstanding commissions due to it after expiration of the Agency Agreement. In response, SMSA and AMCI stated that they would did not consider those commissions due until after the expiration of an additional 12 months from the date of the activation of the account. This, they asserted, was necessary to protect them from the possibility that accounts activated in 1993 would be terminated by the customer prior to the expiration of the first

year, thereby negating the basis of payment of the commissions. Metro agreed to this procedure and waited to be paid.

In 1995, after SMSA and AMCI had refused to pay the commissions then due to Metro (despite the expiration of the 12 months following activation of the related accounts) Metro sought leave in the Original Wayne County Action to file a counterclaim by which it would assert its claims for commissions. Metro was denied leave to assert a counterclaim for commissions against SMSA and AMCI regarding non-trademark claims. Therefore, Metro brought those claims in an action against SMSA and AMCI -- but not Ameritech -- in the State of Michigan's 3rd Judicial Circuit (the "Second Wayne County Action"). The complaint in the Second Wayne County Action also asserted a claim by Metro's owner for tortious interference with advantageous business relationship.

From June, 1995 to October 1995, the parties in the Second Wayne County Action conducted discovery. During this discovery Respondents SMSA and AMCI admitted that the value of the unpaid activation commissions claimed by Metro (not including the residual commissions) was approximately $1.2 million. On October 26, 1995, Metro filed a motion for summary disposition in the Second Wayne County Action premised upon this admission.

In response, SMSA and AMCI filed their own motion for summary disposition, claiming that the claims in the Second Wayne County Action were barred because they were compulsory counterclaims with respect to the Prior Federal Action, though at the time no final order or judgment had been entered in the Prior Federal Action. As of the date of the this petition, the Second Wayne County Action is stayed pending final resolution of this matter. (App. E at 19a-22a).

Accordingly, the state court had made no decision on either of these motions.

On August 6, 1996, in the Prior Federal Action, Respondents AMCI and Ameritech moved for partial summary judgment — their request being expressly limited to the trademark claims in their complaint. This request was granted through a series of rulings by the District Court. After obtaining partial summary judgment, Respondents AMCI and Ameritech moved pursuant to Rule 41(a) of the Federal Rules of Civil Procedure for dismissal *without* prejudice of all non-trademark claims from the Prior Federal Action. Metro unsuccessfully objected to the "without prejudice" element of this request and the district court ordered the *non*-trademark claims dismissed without prejudice.

As of March 11, 1998, only the FCC Proceedings, had been fully resolved. No final order had been entered in any of the state court actions. [2]

On March 11, 1998, Metro had filed a petition pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan. On July 9, 1998, Metro initiated the Adversary Proceeding by filing its complaint against Respondents Ameritech, AMCI, and SMSA. One purpose of the adversary proceeding was to consolidate the parties' multiple proceedings into one forum. The complaint in the adversary proceeding asserted state law claims, only. Nothing in the complaint related to the trademark issues addressed in the Prior Federal Action.

---

[2] The Prior Federal Action became final upon this Court's denial of Metro's and Siavrakas' Petition for Writ of Certiorari on January 10, 2000 (Docket No. 99-723).

On August 28, 1998, Respondents answered the complaint and filed a counterclaim asserting non-trademark claims against arising from the parties' Agency Agreement. In doing so, Respondents took advantage of the limited nature of the judgment in the Prior Federal Action; because of the voluntary dismissal pursuant to FED.R.CIV.P. 41(a) of the non-trademark claims from that action prior to judgment, Respondents' non-trademark claims under the agency agreement were not barred by the doctrine of *res judicata.*

On November 17, 1998, Respondents moved to dismiss the complaint in the adversary proceeding premised upon FED.R.CIV.P. 13(a) and the doctrine of *res judicata.* Respondents asserted that Metro's non-trademark claims had been compulsory counterclaims in the Prior Federal Action. Therefore, argued Respondents, Metro was barred from asserting them in the adversary proceeding.

Metro objected to the proposed dismissal and argued that in light of the voluntary dismissal without prejudice of the non-trademark claims in the Prior Federal Action, both Respondents and Metro were entitled to prosecute their respective non-trademark claims. Metro further argued that the claims asserted in the adversary proceeding were neither compulsory counterclaims with respect to the Prior Federal Action nor barred by the doctrine of *res judicata.*

The District Court rejected Metro's arguments, and dismissed the complaint. It held that Metro's non-trademark claims should have been brought in the Prior Federal Action as mandatory counterclaims pursuant to FED.R.CIV.P. 13(a) and that, based upon the doctrine of *res judicata*, the judgment in the Prior Federal Action barred Metro from asserting any claims against Appellees. (App. B at 7a-9a).

On December 14, 2000, the Court of Appeals for the Sixth Circuit Court, without a written opinion, affirmed the

reasoning employed by the District Court in its discussion of FED.R.CIV.P. 13(a). (App. A at 1a-2a). In doing so, the Court of Appeals for the Sixth Circuit Court ignored the effect of the voluntary dismissal without prejudice of the non-trademark claims in the Prior Federal Action and its effect upon Respondents *res judicata* defense. Because the Court of Appeals considered it unnecessary, it declined to issue a full or published opinion in this matter. Accordingly, its reasoning regarding certain significant matters has not been explained.

## ARGUMENT FOR GRANTING WRIT

The procedural history of this action, coupled with the anomalous result arising from the lower courts' uneven application of the doctrines of *res judicata* and judicial estoppel, present this Court with the opportunity to address the proper use of those doctrines in the Federal Courts, the proper use of Rule 41(a) Federal Rules of Civil Procedure, the preclusive effect of judgments associated with its use, and to explain further when a judgment is "final" for purpose of appellate jurisdiction and *res judicata*.

### I. THE PETITION SHOULD BE GRANTED SO THE COURT MAY INSTRUCT THE LOWER COURTS AS TO WHETHER, AND IF SO TO WHAT EXTENT, A PARTY IS ENTITLED TO ASSERT THE DOCTRINE OF *RES JUDICATA* AS A DEFENSE WHEN A COURT HAS EXPRESSLY LIMITED THE SCOPE OF THE UNDERLYING JUDGMENT BY A DISMISSAL WITHOUT PREJUDICE OF A PORTION OF THE CLAIMS ORIGINALLY ASSERTED IN THE COMPLAINT.

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359, 110 S. Ct. 2447 (1990) this Court touched upon, but did not fully explore, the consequences of a dismissal of an action pursuant to Rule 41(a)(1), Federal Rules of Civil Procedure. There, the Court held that such a dismissal, "does not operate as an adjudication upon the merits, Rule 41(a)(1), and thus does not have a *res judicata* effect." 496 U.S. at 369. However, this ruling did not address the effect, if any, of a dismissal without prejudice pursuant to Rule 41(a)(2) of only a portion of the claims originally asserted in the complaint.

Several circuits and commentators have addressed that question; however, there is a clear split among them.

In the Second, Third, Fifth, Ninth and Tenth Circuits, a prior resolution of less than all claims does not become final upon a dismissal of the unresolved claims without prejudice. *Chappelle v. Beacon Communications, Inc.*, 84 F.3d 652, 653 (2nd Cir. 1996) (precluding appeal of plaintiff's adjudicated claims when unresolved claims were dismissed without prejudice); *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1078 (9th Cir. 1994) (same); *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) (same); *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3rd Cir. 1986) (allowing appeal when remaining unresolved claims "voluntarily and finally abandoned"), *cert. denied*, 481 U.S. 1070 (1987); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302-03 (5th Cir. 1978) (denying appeal and finding voluntary dismissal without prejudice of unresolved claims did not make adjudicated claims appealable). In these Circuits the prior order becomes final only upon: the plaintiff's dismissal of the unresolved claims *with* prejudice or proper Rule 54(b) certification of the district court's decision as to the resolved claim(s). *Chappelle, supra;*

In the Seventh, Eighth and Eleventh Circuits one finds both conclusions are available. *Compare South Austin Coalition Comm. Council v. SBC Communications, Inc.*, 191 F.3d 842 (7th Cir. 1999) (dismissal without prejudice of unresolved claims to obtain finality, "is smoke and mirrors; the reality is that the case is ongoing in the district court, and 28 U.S.C. §1291 does not authorize appeal from resolution of a single claim in a multi-claim or multi-party case"); *and JTC Petroleum Co. v. Piasa Motor Fuels*, Inc., 179 F.3d 1073 (7th Cir. 1999) (no finality where unresolved claims dismissed without prejudice; resulting jurisdictional defect cured by party's conversion of dismissal to one with prejudice) *with Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1266 & n.1 (7th Cir. 1976) (order granting motion to dismiss less than all claims "final" order, despite dismissal without prejudice of unresolved claims), *cert. denied*, 429 U.S. 1029 (1976) *with United States v. Kaufmann*, 985 F.2d 884, 889 (7th Cir.) (partial resolution of claims deemed final and appealable despite dismissal without prejudice of unresolved claims because there was no evidence that the parties had colluded to"create" appellate jurisdiction), *cert. denied*, 508 U.S. 913 (1993); *and compare, DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990) (dismissal without prejudice for failure to prosecute unresolved claims converted earlier partial resolution into a "final" judgment or order) *with Chrysler Motors Corp. v. Thomas Auto Co.*, 939 F.2d 538 (8th Cir. 1991) (earlier decision granting partial summary judgment rendered "final" upon stipulated dismissal without prejudice of unresolved claims) *and State Treasurer v. Barry*, 168 F.3d 8, 10-13 (11th Cir. 1999) (denying appeal and finding voluntary dismissal without prejudice of unresolved claims could not make adjudicated claims appealable) and *Mesa v. United States*, 61 F.3d 20,22 (11th Cir. 1995) (dismissing appeal for lack of jurisdiction and holding that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice) *with Kirkland v. National Mortgage Network, Inc.*,

884 F.2d 1367 (11th Cir. 1989) (voluntary dismissal without prejudice is final and appealable by the defendant) and *Studstill v. Borg Warner Leasing*, 806 F.2d 1005, 1008 (11th Cir. 1986) (plaintiff voluntarily dismissed without prejudice the claims that remained after adverse ruling on partial summary judgment; Court of Appeals conducted review on the merits of the summary disposition ruling).

Therefore, as it stands, a judgment that is associated with the dismissal without prejudice pursuant to Rule 41(a) of a portion of the original claims may be final in the Sixth Circuit, but not in the Second, Third, Fifth, Ninth and Tenth Circuits. In the Seventh, Eighth and Eleventh Circuits, under these circumstances a party is required to speculate as to whether a judgment will ultimately be considered final for purposes of *res judicata* or otherwise. The remaining Circuits have not expressly adopted any approach to this question.

It is difficult to conceive of a more fundamental question of federal civil procedure than whether a judgment or order is final. When that question is complicated by the inconsistent use of Rule 41(a) by the District Courts, it is appropriate for this Court to intervene and address the issues raised by these conditions, including the question of whether the underlying judgment has any preclusive effect beyond its express terms.

## II. THE PETITION SHOULD BE GRANTED TO ADDRESS THE PROPER APPLICATION OF RULE 13(a), FEDERAL RULES OF CIVIL PROCEDURE IN THE CONTEXT OF MULTIPLE PENDING ACTIONS BETWEEN PARTIES BASED INVOLVING DISTINCTLY DIFFERENT SUBJECT MATTER, BUT WHICH INVOLVE A COMMON CONTRACTUAL HERITAGE.

This case also presents an opportunity for the Court to address the application of the several exceptions to the compulsory counterclaim rule set forth in Rule 13 of the Federal Rules of Civil Procedure. In one proceeding, the Court is presented with questions related to: a) the threshold issue of whether two proceedings necessarily arise from the "same transaction or occurrence" merely because they have a common contractual heritage; b) the nature of the prior pending action exception; and c) the application of the un-matured claim exception.

Rule 13(a) requires joinder only of those counterclaims that exist at the time of the relevant pleading and which arise from the same transaction or occurrence as the claims stated in the relevant complaint. However, the rule expressly excepts from joinder claims that are the subject of a prior pending action. Similarly, Rule 13(e) provides that "[a] claim which either matures or was acquired by the pleader after serving a pleading may, with the permission of the court, be permitted as a counterclaim by a supplemental pleading." Thus, a defendant's un-matured claims are not compulsory counterclaims. *See Answering Service, Inc. v. Egan,* 234 U.S. App. D.C. 266, 728 F.2d 1500, 1503 (D.C.Cir. 1984) (Scalia, J. "As a general rule, under federal law a plaintiff does not lose a claim that has not yet

matured because of failure to join it with another claim arising out of the same transaction or occurrence").

Here, the claims asserted by Metro in the Adversary Proceeding did not arise from the same transaction or occurrence as those set forth in the complaint in the Prior Action. While both sets of claims relate to the parties' Agency Agreement, the complaint in the Prior Action was asserted claims that pertained to the post-expiration trademark rights of the parties, while the claims asserted by Petitioner in the Adversary Proceeding pertained to pre-expiration and post-expiration rights to commissions. This very distinction formed the basis of the District Court's decision in the Prior Action to deny Petitioner's motion for abstention; Respondents successfully argued that the mere fact that a given claim could be traced to the Agency Agreement did not mean that it arose from the same transaction or occurrence as another claim with a similar heritage.

Further, at the time the complaint in the Prior Action was filed, there were then two (2) state court actions pending between the parties also arising from the Agency Agreement. Both of these were based upon claims that arose from the Agency Agreement, yet were deemed by the District Court and Sixth Circuit, without explanation, to not qualify for the "prior pending action" exception to Rule 13(a).

Finally, at least a portion of the claims asserted in the Adversary Proceeding were for commissions that, based upon the parties' contract, were not due as of the date the answer in the Prior Action. Under the terms of the Agency Agreement, Respondent SMSA was obligated to pay Metro's residual commissions in sequential payments covering each specific period,. Therefore the amounts due could not be determined nor paid until after each of the related month's accounting cycle had been closed. As an installment

obligation, even if Metro's claim for commissions (sales and residual) were compulsory in response to the trademark claims, only claims regarding activation and residual commissions related to the period prior to the answer date could have matured - by definition, residual commission claims for subsequent periods could not have been mature as of the date of the answer. Further, SMSA and AMCI advised Metro that in order to take possible de-activations into account, the pre-expiration activation commissions could not be paid until after 12 months from the date of activation. This could not have been prior to December 31, 1994 - - one year after the expiration of the Agency Agreement. The stated basis for this maturity date was that until that date, Respondents could not know whether all of Metro's subscribers had continued to use the Ameritech service for at least one year -- which was itself a condition to the payment of the commissions. Therefore, at most, only a claim for residual commissions due prior to the answer in the Prior Federal Action could have been sufficiently mature to render it a compulsory counterclaim pursuant to Rule 13(a).

Despite this, the District Court and the Court of Appeals both concluded that *all* of Metro's Adversary Proceeding Claims for commissions (including those that had not yet vested) were fully mature at the time Metro filed its answer in the Prior Federal Action and constituted compulsory counterclaims and were barred, in total, by Rule 13(a). Based on fundamental Michigan contract law, the language of the Agency Agreement itself and admissions by Respondents, the lower courts' ruling is unsupportable. As permissive counterclaims, Metro's commission claims are not precluded by the entry of the final judgment in the Prior Federal Action.

## III. THE PETITION SHOULD BE GRANTED TO ADDRESS THE DOCTRINE OF JUDICIAL ESTOPPEL AND DETERMINE WHETHER THAT DOCTRINE PERMITS A PARTY TO TAKE LEGAL AND FACTUAL POSITIONS THAT ARE INCONSISTENT WITH ONES SUCCESSFULLY TAKEN BY THAT PARTY IN A PRIOR ACTION INVOLVING THE SAME QUESTIONS OF LAW.

Generally, the doctrine of judicial estoppel forbids a party "from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Teledyne Indus., Inc. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1217 (6th Cir. 1990); *Reynolds v. Commissioner of Internal Revenue*, 861 F.2d 469, 472_73 (6th Cir. 1988) (citations omitted). An equitable doctrine, judicial estoppel is applied to "preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment" and to prevent parties 'from playing 'fast and loose with the courts.'" *Teledyne*, 911 F.2d at 1218, *citing Scarano v. Central R.R.*, 203 F.2d 510, 513 (3rd Cir. 1953); *Edwards v. Aetna Life Insurance Co.*, 690 F.2d 595, 598-99 (6th Cir. 1982). Those courts which have addressed the doctrine have found it applicable when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court either as a preliminary matter or as part of a final disposition. *Id.*

However, this Court has not fully addressed this doctrine, nor established rules for its application by the Federal Courts.

Petitioner submits that this doctrine should have been applied by the District Court and Court of Appeals to preclude their conclusion that the claims in the Prior Federal Action and the Adversary Proceeding Claims arose from the same transaction or occurrence, and that those claims were, therefore, compulsory counterclaims in the Prior Action.

Having successfully argued in the Prior Federal Action that the claims asserted in the complaint in the Prior Action were limited to trademark matters, the doctrine of judicial estoppel should have been applied by the District Court in the Adversary Proceeding and should have required it to reach the same conclusion -- that the claims in the Prior Federal Action arose from a distinct and different transaction or occurrence than other claims between these parties, despite their relationship to the Agency Agreement.

## CONCLUSION

For reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,
KENNETH B. MORGAN
*Counsel of Record*
165 N. Old Woodward Avenue
Birmingham, MI 48009
(248) 594-6340

K. DINO KOSTOPOULOS
165 N. Old Woodward Avenue
Birmingham, MI 48009
(248) 594-6340
*Attorneys for Petitioner*

(any footnotes trail end of each document)

No. 99-1575

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: METRO COMMUNICATIONS COMPANY,
Debtor.

METRO COMMUNICATIONS COMPANY, Plaintiff-Appellant,

v.

AMERITECH; AMERITECH MOBILE COMMUNICATIONS, INCORPORATED; DETROIT SMSA, L.P.,
Defendants-Appellees.

December 14, 2000, Filed

**JUDGES:**
BEFORE: NORRIS and DAUGHTREY, Circuit Judges; BERTELSMAN, District Judge. *.

**OPINION:**

**MEMORANDUM OPINION**

**PER CURIAM.** Plaintiff, Metro Communications Company, appeals from an order of the district court granting summary judgment to defendants Ameritech, Ameritech Mobile Communications, Inc., and Detroit SMSA, L.P., and from an order refusing to reconsider the dismissal. The district court

concluded that plaintiff was required to bring its claim as a compulsory counterclaim in a prior action in federal court.

Having had the benefit of oral argument and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that the district court erred in granting summary judgment to defendants.

Because the reasoning which supports judgment for defendants has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the orders of the district court are affirmed upon the reasoning employed by that court in its discussion of compulsory counterclaims found in its Order dated February 25, 1999.

**Footnotes**

* The Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Case No. 98-73937
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHAGAN
SOUTHERN DIVISION

Metro Communications Company,
Plaintiff,

v.

Ameritech Corp., et al.,
Defendants.

Honorable Nancy G. Edmunds

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' Ameritech Corporation (Ameritech), Ameritech Mobile Communications, Inc. (AMCI), and Detroit SMSA Limited Partnership's (Detroit SMSA) motion to dismiss. The Plaintiff, Metro Communications Company (Metro), alleges breach of a former agency agreement for failure to pay commissions allegedly due Metro following termination of the contract. The Defendants bring this motion to dismiss claiming that the claims set forth in Metro's complaint were required to be brought as compulsory counterclaims in a prior federal action between the parties. As discussed below, Metro's claim was a compulsory counterclaim in the prior suit. Therefore, Defendants' motion to dismiss is GRANTED.

I. Facts

The Plaintiff, Metro, was formerly an authorized agent of Defendant Detroit SMSA. Detroit. SMSA owns one of two Federal Communications Commission (FCC) licenses for the provision of cellular radio service in the Detroit area. Defendant AMCI acts as the managing partner of SMSA. AMCI and SMSA are both affiliates of Defendant Ameritech.

In 1984 and in 1988, Metro entered into agency agreements with the Defendants, according to which Metro distributed Ameritech cellular service. The 1988 agreement provided for commissions to be paid to Metro based on the volume of sales. The current action was filed by Metro in bankruptcy court, seeking to recover activation and residual commissions allegedly due Metro pursuant to the previous agreement. The parties' agency agreement expired on December 31, 1993.

The parties in this action have a long history of litigation between them. In addition to various state court actions between them, Ameritech and AMCI sued Metro on June 24, 1994 in federal district court. SMSA was not a party to the litigation. The complaint alleged federal trademark violations; federal unfair competition claims, including Lanham Act violations, 15 USC §1125(a); and various state law claims, including state trademark infringement, interference with contractual relations and breach of contract.[1] The breach of contract claim alleged that Metro continued to sell cellular service after the expiration of the agency agreement.

Partial summary judgment was eventually granted in favor of Ameritech and AMCI, on the federal trademark claims and on the breach of contract claim related to the agency agreement. After obtaining partial summary

judgment, Ameritech and AMCI moved for a voluntary dismissal without prejudice pursuant to Fed.R.Civ.Pro. 41(a), of all other aspects of the case that were not the subject of Judge Woods' summary judgment order, Although Metro opposed the motion, the dismissal was granted. *See* Plaintiffs Response Brief, Exb. 14. Metro never raised its claim for commissions before Judge Woods.

A few months prior to the federal litigation, in February of 1994, Detroit SMSA and AMCI commenced a separate action against Metro in Wayne County Circuit Court (Wayne County Action I). The case involved the issue of whether Metro was required to give Detroit SMSA and AMCI all of the information related to Metro's customers. That case was assigned to Judge Pamela Harwood. On June 24, 1994, Metro sought leave to file a counterclaim in Wayne County Action I, seeking commissions. Judge Harwood denied leave.

Subsequently, on June 30, 1995, Metro filed a state action seeking to recover the commissions. (Wayne County Action II). The new state court case was also assigned to Judge Harwood. In Wayne County Action II, Metro filed a motion for summary disposition, based on an alleged admission by SMSA and AMCI that the value of unpaid activation commissions was approximately $1.2 million. In response to that motion, SMSA and AMCI filed a cross motion for summary disposition, alleging Wayne County Action II was barred because it was premised on claims that were compulsory counterclaims with respect to the federal action before Judge Woods.

As of the date of oral argument on this motion, no decision had been issued by Judge Harwood on the cross

motions for summary disposition. Subsequent to the hearing in this matter, the parties entered into a stipulation staying Wayne County Action II pending final disposition in this Court. (See Stipulation and Order Staying Wayne County Michigan Circuit Court Action No. CA-95-51 8972-CK Pending Final Resolution of Federal Action).

Metro never counterclaimed for commissions in the action before Judge Woods. Metro seeks those commissions in this action instead. Ameritech, AMCI, and Detroit SMSA now seek to bar Metro's claims for commissions in this action based on the compulsory counterclaim rule, Fed.R.Civ.Pro. 13(a) and res judicata principles.

## II. Standard for Summary Judgment[2]

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp.* v. *Catrett, 471* US. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323. Once the movant meets this burden, the non movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial* Co., *Ltd. v. Zenith Radio Corp. 475* U.S. 574, 587 ( 1986) To demonstrate a genuine issue, the non-movant must

present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *Liberty Lobby*, 477 U.S. at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *Liberty Lobby*, 477 U.S. at 255.

III. Analysis

The doctrine of res judicata is intended to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. MaCtiny*, 449 U.S. 90, 94(1980); *Fellowship of Christ Church v. Thorbum*, 758 F.2d 1140, 1144 (6th Cir. 1985). Res judicata, is also referred to as claim preclusion because it promotes finality and judicial economy, and forecloses relitigation of matters that were determined, or should have been raised, in a prior suit in which a court entered a final judgment on the merits. See *Migra v. Warren City School Dist*, 465 U.S. 75(1984); *Fellowship*, 758 E2d at 1143.

Claim preclusion mandates that if an action is terminated by a judgment on the merits, that judgment constitutes a total bar to any subsequent action on the same cause involving the respective parties and their priyies, not only for every matter that actually was litigated in the first matter, but also as to every ground of recovery that might have been presented. *Action Distrib. v. Teamsters Local 1038*, 977 F.2d 1021, 1026 (5(11 Cir. 1992); *see also Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994); *White v. Colgan Elec. Co.*, 781 F.2d 1214, 1216 (6th

Cir. 1986).

Defendants assert that Plaintiffs claims in this case should be dismissed because they were compulsory counterclaims which should have been brought in prior federal litigation between the parties. Federal Rule of Civil Procedure 13(a) defines a compulsory counterclaims. In pertinent part, the rule states:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing parties' claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Fed.R.Civ.Pro. 13(a).

Compulsory counterclaims which are not asserted are thereafter barred. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467,469 (1974) In order to determine whether Plaintiffs claim for commissions in this matter is barred for failing to bring the claim in the prior federal action, the Court must determine whether the claim was compulsory. The test of whether a counterclaim is compulsory under Rule 13 is whether there is a "logical relationship between the two claims" *Maddox v. Kentucky Finance Co., Inc.*, 736 F.2d 380, 382 (6th Cir.1984).

Metro's claim for commissions here was logically related to the breach of contract claim adjudicated before Judge Woods and arose out of the same transaction or

occurrence as that prior federal litigation. In the action before Judge Woods, Ameritech and AMCI alleged that Metro breached the agency agreement by continuing to solicit customers following the agreement's termination. Metro's breach of the post-termination provisions of the agency agreement and continued use of Ameritech trademarks prompted that litigation. Judge Woods determined that Metro breached the agency agreement and entered summary judgment in favor of Ameritech on the breach of contract claim.

In the present action, Metro attempts to show that Ameritech breached the contract by failing to pay Metro post-termination commissions. Metro also claims here that it performed all of its obligations under the agency agreement, as it must in order to establish a breach of contract claim and entitlement to commissions. However, the issue of whether Metro breached the agency agreement was directly at issue in the first action before Judge Woods. The issue of whether Metro is entitled to commissions under that agreement is logically and inextricably related to whether Metro breached the agreement. Metro's claim for commissions is a classic example of a compulsory counterclaim.

In breach of contract cases, the question of preclusion "can be resolved by a simple rule that the first suit must claim every breach." *Container Transport Int'l v. us,* 468 F.2d 926 (Ct. Cl. 1972) *See also* WRIGHT & MILLER, § 4408. Many cases hold that all breaches of contract must be included as part of a the breach of contract claim, or any right to recover for breaches will be lost. Restatement (Second) of Judgments, § 25 cmt. b(1982); *Prime Management Co. v. Steinegger,* 904 F.2d 811, 816 (2d Cir. 1 990)("[W]hen the parties have entered into a contract to be performed over a period of time and one party has sued for a breach, res judicata will preclude the party's subsequent suit for any claim of breach that had occurred prior to the first suit."); *Diaz v. Indian Head, Inc.,*

686 F.2d 558, 563-64 (7th Cir. 1 982)(judgment in prior action seeking to have non-competition clause in employment contract declared unenforceable precluded subsequent action for commissions due under the contract); *Petromanagement Corp.* v. *Acme-Thomas Joint Venture*, 835 F.2d 1329, 1336 10th Cir. 1988)("[W]e see no reason to depart from the bright line standard that all contractual breaches should be raised in a single action."); See also MOORE'S FEDERAL PRACTICE § 131.23[1] Indeed, the issue of whether Metro breached the agency agreement, which was already adjudicated by Judge Woods, is logically related to whether Metro is entitled to commissions. Those claims clearly arise out of the same transaction or occurrence. Metro's argument to the contrary is rejected.

Metro sets forth two additional reasons why its claim for commissions was not a compulsory counterclaim in the earlier federal litigation. First, Metro correctly points out that a claim is not compulsory where the counterclaim is the subject of another pending action at the time the action was commenced. *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467 (1974). However, this pending action exception does not apply in this case because at the time Metro filed its answer in the federal action before Judge Woods, there was no pending action involving the counterclaim for commissions. Metro filed its answer in the federal case in August of 1994. Metro did not file its state court action for commissions until June 30, 1995. While it is true that there were other actions pending relating to the agency agreement, the other actions did not involve the claim for commissions asserted here. Therefore, the pending action exception does not save Metro's claim.

Lastly, Metro argues its claim for commissions was not fully vested when it was time for it to file an answer in the prior federal action. Even when a counterclaim meets the same transaction or occurrence test, a party need not assert it

as a compulsory counterclaim if it has not matured when the party serves its answer. *Burlington Northern Railroad Co. v. Strong*, 907 F.2d 707, 712 7th Cir. 1990). However, Metro's commission claim was fully mature at the time it filed its answer to the federal action in August 1994. The agency agreement provided that commissions would be paid within 15 days of the close of each monthly billing cycle. By August of 1994, commissions for activations submitted by Metro before the agreement terminated on December 31, 1993 were vested. In fact, in June of 1994, two months before filing its answer in the prior federal action, Metro sought leave to amend its answer in state court to assert its commission claim. Thus, Metro cannot now assert that the claim was not mature in August of 1994.

Metro's claim for commissions arose out of the same transaction or occurrence of Ameritech and AMCI's prior suit against them before Judge Woods. Metro's claim was a compulsory counterclaim in that action. Metro's failure to assert that claim then is a bar to bringing it in this Court now.

IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

The Defendants' motion to dismiss is GRANTED.

IT IS SO ORDERED.
Nancy G. Edmunds
U.S. District Judge
Dated: 2/25/99

Footnotes

[1] The case was assigned to Judge Woods, Case No. 94-72443.

[2] Because the parties ask the Court to refer to exhibits which exceed the pleadings, the Court will treat this motion as a motion for summary judgment pursuant to Fed.R.Civ.Pro. 56.

Case No. 98-73937
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHAGAN
SOUTHERN DIVISION

Metro Communications Company,
Plaintiff,

v.

Ameritech Corp., et al.,
Defendants.

Honorable Nancy G. Edmunds

JUDGMENT

Being fully advised in the premises, having read the pleadings, and this Court having granted Defendants' motion to dismiss, the Court hereby orders as follows:

IT IS ORDERED that judgment be and hereby is entered in favor of the Defendants and against the Plaintiff in this matter.

IT IS SO ORDERED.

Nancy G. Edmunds
U. S. District Judge
Dated: 2/22/99

Case No. 98-73937
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHAGAN
SOUTHERN DIVISION

Metro Communications Company,
Plaintiff,

v.

Ameritech Corp., et al.,
Defendants.

Honorable Nancy G. Edmunds

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

This matter has come before the Court upon the March 11, 1999 motion of Metro Communications Company for reconsideration of this Court's opinion and order granting Defendants' motion to dismiss.

Pursuant to Rule 7.1(g) of the Local Rules for the Eastern District of Michigan, a motion for reconsideration may be filed within ten days after the order to which it objects is issued. It should be granted if the movant demonstrates that the Court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such palpable defect. A motion that merely presents the same issues already ruled upon by the Court shall not be granted.

Because the Plaintiff fails to demonstrate that the Court and the parties were misled by any palpable defect, the motion for reconsideration of the opinion and order granting

Defendants' motion to dismiss is hereby DENIED.

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows:

The Plaintiffs motion for reconsideration is DENIED.

IT IS SO ORDERED.

Nancy G. Edmunds
U. S. District Judge
Dated: 5/3/99

Case No. 98-73937
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHAGAN
SOUTHERN DIVISION

Metro Communications Company,
Plaintiff,

v.

Ameritech Corp., et al.,
Defendants.

Honorable Nancy G. Edmunds

ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b)

This matter having been addressed by the Court during a conference call with counsel for the parties on October 19, 1999, and the Court being fully advised in the premises, the Court hereby makes the following findings and directs entry of a judgment of no cause of action as to the claims asserted by Plaintiff in this adversary proceeding:

1. This adversary proceeding was commenced on July 9. 1999. At the commencement of the action, Plaintiff demanded a trial by jury.

2. On August 10, 1998, Defendants answered the Plaintiffs complaint. The original answer did not contain a counterclaim.

3. On August 26, 1998, Defendants filed and served an amended answer together with a counterclaim against Plaintiff. The claim(s) set forth in the counterclaim

are. distinct from those asserted in the complaint as they depend upon the resolution of separate factual and legal issues and do not arise from a common nucleus of operative fact. Although they do arise from the same contract, the claim and counterclaim each involve separate and independent contract clauses and each relates to a different course of conduct by the parties.

4. Because Defendants did not consent to a trial by jury in the Bankruptcy Court, on September 24, 1998, this Court entered an order withdrawing the reference pursuant to the recommendation of the Bankruptcy Court.

5. On November 17, 1998, Defendants moved in this Court for dismissal of the complaint premised upon Fed.R.Civ.P. 13(a) and the doctrine of res *judicata.* Defendants contended that the claims asserted in the complaint were mandatory counterclaims that should have been asserted, if at all, in a prior action in this District between Plaintiff and Defendants Ameritech and Ameritech Mobile Communications, Inc., (ED. Mich. Case No. 94-CV-72443-DT), and that such claims are precluded by the doctrine of *res judicata.* In support of their position, Defendants cited to authority from the United States Court of Appeals for the Sixth Circuit which they consider dispositive of the Issues presented and argued that this authority should compel this Court to grant the motion to dismiss.

6. Plaintiff opposed the motion to dismiss and argued, at the hearing on the motion and later in its motion for reconsideration filed on March 10, 1999, that the claims asserted in this action were neither compulsory counterclaims with respect to the prior federal action

nor barred by the doctrine of *res judicata.* In support of its position, Plaintiff cited to authority from the United States Court of Appeals for the Sixth Circuit which it considers dispositive of the issue presented and argued that this authority should compel this Court to deny the motion to dismiss.

7. Based upon the Court's review of the materials presented by the parties, and notwithstanding the existence of a reasonable basis for good faith differences of opinion as to the proper resolution of the legal issues presented in this matter, this Court granted Defendants' motion to dismiss on February 25, 1999. Plaintiff filed a motion for reconsideration and on May 3, 1999, that motion was denied.

8. When the Defendants' motion to dismiss was granted, the Court was unaware of the counterclaim (as it was not contained in the materials forwarded to the District Court by the Bankruptcy Court) and, therefore, did not address it in the Opinion and Order of February 25, 1999. Regardless, resolution of Defendants' motion to dismiss would have been unaffected by the counterclaim, as it asserted claims that are both factually and legally distinct from those claims set forth in Plaintiffs complaint.

9. Under these circumstances, pursuant to Fed.R.Civ.P. 54(b) the Court finds that, notwithstanding the pendency of the counterclaim, there is no just reason for delay in the entry of a final judgment of no cause for action as to the claims asserted in Plaintiffs complaint.

Accordingly, it is ordered that judgment in accordance with this order be presented by Defendants for immediate entry.

Nancy G. Edmunds
USDCJ
Date: 10/15/99

Case No. 98-73937
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHAGAN
SOUTHERN DIVISION

Metro Communications Company,
Plaintiff,

v.

Ameritech Corp., et al.,
Defendants.

Honorable Nancy G. Edmunds

| | |
|---|---|
| Dickinson Wright PLLC<br>Edward H. Pappas (P23224)<br>Kenneth J. McIntyre (P17450)<br>Robert W. Powell (P34127)<br>Attorneys for Defendants<br>500 Woodward Avenue<br>Suite 4000<br>Detroit, MI 48226-3425<br>(313) 223-3500 | MORGAN & ASSOCIATES<br>Kenneth B. Morgan (P34492)<br>Attorney for Plaintiff<br>165 N. Woodward Ave<br>Birmingham, MI 48009<br>(248) 594-6340 |

STIPULATION AND ORDER STAYING WAYNE COUNTY, MICHIGAN CIRCUIT COURT ACTION NO. CA-95-518972-CK PENDING FINAL RESOLUTION OF FEDERAL ACTION

Submitted by,

DICKINSON WRIGHT PLLC
By:
Kenneth J. McIntyre (P17450)
Attorneys for Defendants
500 Woodward Avenue, Suite 4000

Case No. 95-518972-CK
STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Metro Communications Company,
Plaintiff,

v.

Detroit SMSA Limited Partnership, et al.,
Defendants.

Honorable Pamela R. Harwood

| | |
|---|---|
| MORGAN & ASSOCIATES<br>Kenneth B. Morgan (P34492)<br>Attorney for Plaintiff<br>165 N. Woodward Ave<br>Birmingham, MI 48009<br>(248) 594-6340 | Dickinson Wright PLLC<br>Edward H. Pappas (P23224)<br>Kenneth J. McIntyre (P17450)<br>Robert W. Powell (P34127)<br>Attorneys for Defendants<br>500 Woodward Avenue<br>Suite 4000<br>Detroit, MI 48226-3425<br>(313) 223-3500 |

STIPULATION AND ORDER STAYING THIS ACTION PENDING FINAL RESOLUTION OF FEDERAL ACTION

PRESENT: HON. Pamela R. Harwood
Circuit Court Judge

Date: 2/18/99

At a session of said Court held in the City County Building, City of Detroit, County of Wayne, Michigan on _____.

On June 30, 1995, the captioned Wayne Circuit Court Civil Action No. 95518972-CK was commenced. On November 2, 1995, Plaintiffs moved for summary disposition and on November 10, 1995, Defendants moved for summary disposition, which motions are pending; and

On July 9, 1998, Plaintiffs commenced an action in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division, entitled *Metro* Communications Company, Plaintiff vs. Ameritech, Ameritech Mobile Communications,

*Inc. and Detroit SMSA Partnership*, to recover money and to disallow claims, being case No. 98-44662-R, which case was transferred from the Bankruptcy Court to the Federal District Court for the Eastern District of Michigan and is currently pending; and

The Complaint To Recover Money And To Disallow Claims in the Eastern District of Michigan Case No. 98-44662-R claims monies due for commissions from Ameritech to Metro, which claim is also asserted in the Complaint in case No. 95518972-CK pending before this Court and is the subject of motions for summary judgment pending in this Court; and

Counsel have informed this Court that United States District Court Judge Nancy Edmunds noted, during an oral argument on a Motion For Summary Judgment in federal case No. 98-73937, that the same issue which is the subject of motion in that Court, is also the subject of a motion pending before this Court; and

There is a common issue of whether claims asserted in this Court and in the Federal District Court case were barred as compulsory counterclaims which allegedly should have been previously asserted in *Ameritech Corporation and Ameritech Communications, Inc. v Metro Communications*

*Company and Peter* Sia *vrakas,* being United States District Court for the Eastern District of Michigan Civil Action No. 94-CV 72443-DT filed on June 24, 1994; and

The parties having stipulated to the entry of this Order and the Court being familiar in the premises;

IT IS HEREBY FOUND THAT:

It is appropriate to stay this matter in order to avoid possible inconsistent judicial results and to serve judicial economy.

IT IS HEREBY ORDERED THAT:

This action is hereby stayed until 30 days after final disposition of Metro Communications Company v Ameritech Corporation, Ameritech Mobile Communications, Inc. and Detroit SMSA Limited Partnership, United States District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 98-73937. This Order is without prejudice to any rights or obligations of any of the parties herein or to any legal or factual arguments which the parties might assert.

This Order is stipulated to by the parties through their counsel:

METRO COMMUNICATIONS. INC.

By: Kenneth Morgan (P34492)

AMERITECH and DETROIT SMSA

By: Kenneth J. McIntyre (P17450)

Supreme Court, U.S.
FILED
APR 13 2001
CLERK

No. 00-1432

In the
# Supreme Court of the United States

Metro Communications Company,
*Petitioner*,

v.

Ameritech Corporation,
Ameritech Mobile Communications, Inc.,
and Detroit SMSA Limited Partnership,
*Respondents*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

KENNETH J. MCINTYRE
*Counsel of Record*
DICKINSON WRIGHT PLLC
500 WOODWARD AVE.
SUITE 4000
DETROIT, MI 48226
(313) 223-3500

*Counsel for Respondents*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

21 pp

## QUESTIONS PRESENTED

1. Whether there is a conflict among the United States courts of appeal regarding the finality of a judgment that grants a plaintiff all of the requested relief when the judgment addresses some, but not all, of the plaintiff's alternative theories for relief, and when a subsequent order voluntarily dismisses without prejudice the remaining mooted legal theories.

2. Whether Fed. R. Civ. P. 13(a) requires that a sales agent's claim for commissions is a mandatory counterclaim to the principal's claim for a breach of the agency contract, especially when the sales agent's performance is an issue with respect to both claims.

3. Whether the doctrine of judicial estoppel requires further development by this Court.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondents rely upon the Corporate Disclosure Statement filed in their Brief on Appeal in this case in the United States Court of Appeals for the Sixth Circuit.

## TABLE OF CONTENTS

Questions Presented . . . . . i

Corporate Disclosure Statement . . . . . ii

Table of Contents . . . . . iii

Table of Authorities . . . . . iv

Statement of the Case . . . . . 1

Argument . . . . . 4

I. The Circuit Courts Uniformly Agree That A Judgment Is Always Final For The Purposes Of Res Judicata When It Grants A Plaintiff All Of The Relief It Requested, Even When The Judgment Is Followed By A Voluntary Dismissal Without Prejudice Of Mooted Claims . . . . . 4

II. The Lower Courts Correctly Ruled That Petitioner's Claim For Commissions Was A Mandatory Counterclaim In The First Federal Action . . . . . 12

III. This Case does Not Provide An Occasion For The Development Of The Doctrine Of Judicial Estoppel . . . . . 13

Conclusion . . . . . 15

## TABLE OF AUTHORITIES

Cases

*Brown Shoe Co. v. United States*,
370 U.S. 294 (1962) . . . . . 5

*Chappelle v. Beacon Communications Corp.*,
84 F.3d 652 (2d Cir. 1996) . . . . . 9

*Chrysler Motors Corp. v. Thomas Auto Co., Inc.*,
939 F.2d 538 (8th Cir. 1991) . . . . . 8

*Coleman v. C.I.R.*, 16 F.3d 821 (7th Cir. 1994) . . . . . 7

*Cook v. Rocky Mountain Bank Note Co.*,
974 F.2d 147 (10th Cir. 1992) . . . . . 9

*Federated Dep't Stores, Inc. v. Moite*,
452 U.S. 394 (1981) . . . . . 5

*Hicks v. NLO, Inc.*, 825 F.2d 118 (6th Cir. 1987) . . . . . 8

*Kane v. Magna Mixer Co.*,
71 F.3d 555 (6th Cir. 1995), *cert denied*,
517 U.S. 1220 (1996) . . . . . 5

*Pegram v. Herdrich*,
530 U.S. 211, 228 n.8 (2000) . . . . . 14

*Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*,
954 F.2d 1397 (7th Cir. 1992) . . . . . 6, 7

*Ryan v. Occidental Petroleum Corp.*,
577 F.2d 298 (5th Cir. 1978) . . . . . 8, 11

*Schoenfeld v. Babbit*,
168 F.3d 1257 (11th Cir. 1999) . . . . . 11

*State Treasurer v. Barry*,
168 F.3d 8 (11th Cir. 1999) . . . . . 10-11, 12

*Warshawsky & Co. v. Arcata Nat'l Corp.*,
552 F.2d 1257 (7th Cir. 1977) . . . . . 13

**Other Authorities**

28 U.S.C. § 1291 . . . . . 4, 7, 8

Fed. R. Civ. P. 12(b)(6) . . . . . 3

Fed. R. Civ. P. 13 . . . . . 3

Fed. R. Civ. P. 13(a) . . . . . i

Fed. R. Civ. P. 41(a) . . . . . 2

Fed. R. Civ. P. 41(a)(2) . . . . . 8, 10

Fed. R. Civ. P. 54(b) . . . . . 8

15A Charles A. Wright, et al.,
Federal Practice & Procedure § 3914.8 . . . . . 8

## STATEMENT OF THE CASE

Petitioners' statement of procedural history in their petition mischaracterizes the nature of the claims in this case and in the prior federal court case and obscures the actual relationship between these cases. A proper understanding of this case and of the nature of Petitioner's arguments depends upon a correct statement of the factual and procedural background.

Respondent Ameritech Mobile Communications, Inc. (AMCI) is a wholly-owned subsidiary of Respondent Ameritech Corporation, and AMCI sells and markets cellular radio service (CRS), which is commonly known as mobile phone service. The FCC has licensed Respondent Detroit SMSA to provide CRS in southeastern Michigan, and AMCI acts as the managing partner of Detroit SMSA.

AMCI entered into an agency agreement with Petitioner under which Petitioner sold CRS on behalf of AMCI and Detroit SMSA. That agreement expired on December 31, 1993. Six months later, on June 24, 1994, Ameritech and AMCI sued Petitioner and Peter Siavrakas, Petitioner's sole shareholder and president, in the United States District Court for the Eastern District of Michigan. The case was assigned to the Honorable George E. Woods. Among other things, Ameritech and AMCI alleged that the defendants had breached the agency agreement by continuing to sell AMCI's cellular service and to use Ameritech's and AMCI's trademarks after the expiration of the agency agreement. The complaint also challenged the use of the trademarks under the Lanham Act. Although Ameritech and AMCI asserted two causes of action, each sought the same kind of relief, which was money damages along with an injunction against the use of their trademarks. In August

1994, Petitioner and Mr. Siavrakas filed their answer but did not include a counterclaim of any kind.

In 1995, Ameritech and AMCI moved for summary judgment on their breach-of-contract cause of action. Judge Woods ruled that Petitioner and Mr. Siavrakas had breached the agency agreement and, as an initial matter, granted the requested injunction that prevented Petitioner from selling Ameritech mobile phone service. Later, Judge Woods entered an order fixing the damages to which Ameritech and AMCI were entitled. Finally, in September 1997, he awarded attorneys' fees to Ameritech and AMCI. Thus, by the end of the case, he had given Ameritech and AMCI all of the relief that they had requested, but he had only ruled on their allegations of breach of contract. The Lanham Act claims had not yet been addressed, and these mooted causes of action were voluntarily dismissed without prejudice under Fed. R. Civ. P. 41(a). Petitioner and Mr. Siavrakas appealed the judgment of the district court and the United States Court of Appeals for the Sixth Circuit affirmed. They also came to this Court, asking for a writ of certiorari, and, in a supplemental brief to that petition, they raised essentially the same argument that they advance in this case regarding the finality of orders under Rule 41(a).

In June 1998, Petitioner initiated this case as an adversary action in bankruptcy court, alleging that Ameritech and AMCI had breached the agency agreement by failing to pay commissions, some of which were supposedly earned after the expiration of the agency agreement. This was not, however, the first time that Petitioner had sought to recover these commissions from Ameritech and AMCI. In 1994, AMCI and Detroit SMSA had brought a suit against Petitioner in Michigan state court, seeking the return of some customer information that Petitioner wrongfully held after the agency

agreement expired. In this state court case, Petitioner moved for leave to file a counterclaim for its commissions, but the state court denied the motion on the ground that the counterclaim should have been asserted in the first federal action then pending in the Eastern District. Ameritech's counsel even stipulated that Petitioner could file its commissions counterclaim in the first federal action, but Petitioner declined this offer.

The bankruptcy case was removed to the Eastern District of Michigan, and Respondents moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6), contending that Petitioner's claim for commissions was a compulsory counterclaim in the first federal action. The Honorable Nancy Edmunds granted this motion, agreeing that under Fed. R. Civ. P. 13, Petitioner's claim for commissions was a compulsory counterclaim in the first federal action and, under the doctrine of res judicata, was therefore barred. She specifically held that the claim for commissions was logically related to Ameritech's and AMCI's claim for breach of the agency agreement and that the issue of Petitioner's performance of the agreement was an essential aspect of both claims.

Petitioner appealed Judge Edmund's ruling to the Sixth Circuit, which summarily affirmed her opinion, adopting her reasoning as correct and sufficient. Petitioners have sought a writ of certiorari in this Court, asking for a review of the Sixth Circuit's decision.

## ARGUMENT

### I. THE CIRCUIT COURTS UNIFORMLY AGREE THAT A JUDGMENT IS ALWAYS FINAL FOR THE PURPOSES OF RES JUDICATA WHEN IT GRANTS A PLAINTIFF ALL OF THE RELIEF IT REQUESTED, EVEN WHEN THE JUDGMENT IS FOLLOWED BY A VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF MOOTED CLAIMS.

Petitioners contend that the Courts of Appeal disagree on the question whether a judgment order is final for purposes of the doctrine of res judicata when it addresses some but not all of the plaintiff's legal theories and when it is followed by a voluntary dismissal without prejudice of the remaining theories. Even if this is a live question among the federal appellate courts (and this proposition is debatable), that question is not presented here. In the cases that Petitioner cites to create the appearance of a circuit split, the partial judgment orders were in favor of defendants and plaintiffs voluntarily dismissed their remaining causes of action in an effort to create finality and manufacture appellate jurisdiction. In contrast, in this case, Respondents — plaintiffs below — prevailed on a motion for partial summary judgment, which granted them all of the relief that they could receive, and then voluntarily dismissed their redundant, mooted legal theories without prejudice. There is no controversy among the federal courts on the question whether an appeal may be taken from a judgment that resolves all of the issues in the case and concludes all of the parties' rights and liabilities. Such a judgment is the epitome of a "final order," as defined for the purposes of 28 U.S.C. § 1291, and certainly meets the requirements of finality for res judicata. If there is a question about how far ***losing*** plaintiffs may go in attempting to

manufacture finality for an order granting partial summary judgment for defendants, such a question is simply not presented by this case.[1]

The fundamental principle relevant to this case pertains to the definition of "finality" for purposes of res judicata. Under the doctrine of res judicata, the issuance of a final judgment in one case prevents the parties to that case or their privies from relitigating the causes of action or constituent issues that were resolved by the judgment. *Federated Dep't Stores, Inc. v. Moite*, 452 U.S. 394, 398 (1981). It is well-settled that a final order in the district court is one that disposes of all of the rights and liabilities of the parties and leaves the district court with nothing left to do but execute the judgment. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 306-08 (1962) (concluding that a judgment was final because "[e]very prayer for relief was passed upon"). Consequently, an order is "final" if it completely disposes of the plaintiff's claim by awarding a plaintiff all of the relief requested. *See id.* An order may award a plaintiff all of its

---

[1] Indeed, there is a question whether any concepts of "finality" are relevant here at all. Although the district court invoked the doctrine of res judicata as a basis for its dismissal of Petitioner's claim for commissions, it is not clear that the doctrine of res judicata was necessary for a ruling that a claim is barred when it was a mandatory counterclaim in a prior action but was not asserted. Instead of res judicata, the doctrine of waiver and estoppel may be the proper basis for finding that the claim is barred. *See Kane v. Magna Mixer Co.*, 71 F.3d 555 (6th Cir. 1995), *cert denied*, 517 U.S. 1220 (1996). For the purposes of this brief, Respondents assume for the sake of argument — but do not concede — that res judicata is the proper basis for the district court's conclusion that Petitioners' claim for commissions was barred.

requested relief without addressing each and every count of the complaint. As the Seventh Circuit noted, "[d]ifferent theories of relief — that is, different legal characterizations of the same facts — are not separate claims." *Production & Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1402 (7th Cir. 1992). A plaintiff makes a single claim when it presents one request for relief on the basis of one set of facts, even if the plaintiff characterizes those facts in terms of different legal theories and describes those theories in separate counts. *See id.* Therefore, when a court awards all of the requested relief, it resolves the claim and concludes the action, even if it does not rule on all of the legal theories and allows the voluntary dismissal without prejudice of some of the counts reflecting those theories.[2]

For example, in *Local 504, supra*, plaintiffs alleged that the trustees of their pension plan had improperly amended it. They characterized this action as a violation of certain sections of the Employee Retirement Income Security Act ("ERISA") and, alternatively, as a common law breach of fiduciary duty, but they asked for a single form of relief. The district court granted summary judgment on the ERISA causes of action and, in a separate, later order, granted the plaintiffs' voluntarily dismissal without prejudice of the fiduciary duty cause of action. The Seventh Circuit held that:

> A dismissal without prejudice is generally not final and appealable. . . . In this case,

---

[2] Plaintiffs will usually have good reasons for not permanently renouncing their mooted causes of action in a dismissal with prejudice. In the event that an appellate court will reverse a partial summary judgment and remand the case for trial or, at least, further proceedings, the plaintiff may wish to reassert the theories on which the trial court did not rule.

> however, the district court's summary judgment on the § 204(g) and (h) [of ERISA] counts granted the plaintiffs all of the relief they had requested and were entitled to. As plaintiffs noted in the memorandum they filed in the district court supporting their motion to dismiss, trial on the two remaining claims would have been unnecessary. By dismissing the final two counts, the district court ended the litigation in that court.

*Local 504*, 954 F.2d at 1402 (citations omitted). Consequently, it is well-established and obvious that a district court issues a final order when it grants summary judgment to the plaintiff and awards all of the relief that the plaintiff requested, even if the summary judgment does not dispose of all of the plaintiff's causes of action, and even if the unresolved causes of action are voluntarily dismissed without prejudice.[3] The fact that the redundant, mooted claims were dismissed without prejudice poses no threat of piecemeal litigation. The prevailing plaintiff could not file a new complaint on the basis of those claims because, having been afforded full relief, it could not possibly show injury, which would be a prerequisite for asserting a claim.

The cases that Petitioners discuss in their description of a circuit split are fundamentally different from this case.

---

[3] In *Local 504*, the court addressed the definition of "finality" for the purpose of applying 28 U.S.C. § 1291. It is well-established that the definition of finality necessary to invoke appellate jurisdiction is more stringent than the definition required for the application of the doctrine of res judicata. *See Coleman v. C.I.R.*, 16 F.3d 821, 830-31 (7th Cir. 1994). Thus, if an order is "final" for the purposes of § 1291, it is *a fortiori* final for the purpose of res judicata.

Petitioners' cases involve plaintiffs that received **adverse** judgments eliminating some of their causes of action. Those plaintiffs attempted to convert a partial judgment into a final one by employing Rule 41(a)(2) of the Federal Rules of Civil Procedure to voluntarily dismiss their remaining causes of action without prejudice, even though those causes of action presented live issues subject to district court resolution. In this case, the causes of action that were voluntarily dismissed without prejudice were superfluous and moot, and they left nothing for the district court to resolve. Consequently, their dismissal does not reflect an attempt to "manufacture" finality.

Petitioners may be correct in arguing that there is a circuit split on the propriety of asserting appellate jurisdiction of cases in which a plaintiff has attempted to artificially convert an adverse, partial summary judgment into an order that meets the finality requirements of § 1291. *See* 15A Charles A. Wright, *et al.*, Federal Practice & Procedure, § 3914.8 (discussing this kind of "manufactured" finality). As Petitioners suggest, when that type of procedural jockeying occurs (which did not happen here), there is some dispute among the federal appellate courts about the propriety of such a procedure. *See id*; *compare Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987) (a partial summary judgment can be converted into final order when plaintiff voluntarily dismisses remaining claims without prejudice, as long as district court is not deceived about reasons for and nature of dismissal) *and Chrysler Motors Corp. v. Thomas Auto Co., Inc.*, 939 F.2d 538, 540 (8th Cir. 1991) (when district court dismissed some causes of action without prejudice after granting partial summary judgment against counter-plaintiff, "the effect of [the dismissal] was to make the judgment granting partial summary judgment a final judgment for purposes of appeal, even though the district court had not so certified under Fed. R. Civ. P. 54(b)") *with Ryan v. Occidental Petroleum Corp.*,

577 F.2d 298, 302-03 (5th Cir. 1978) (plaintiff could not employ a voluntary dismissal without prejudice to convert adverse partial summary judgment to final order for purposes of § 1291) *and Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992) ("plaintiff cannot be allowed to undermine the requirements of Rule 54(b) by seeking voluntary dismissal [without prejudice] of her remaining claims and then appealing the claim that was dismissed with prejudice") *and Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996) (same). These cases are irrelevant, however, to this case, where plaintiffs prevailed and a final judgment was entered.

In declining to allow **losing** plaintiffs to use Rule 41(a)(2) as an instrument for manufacturing a final order, courts have noted that such a procedure creates a risk of piecemeal litigation. *See Chappelle, supra; Cook, supra*. If a plaintiff appeals an adverse judgment on some of the causes of action related to a single case and loses, it may revive the dismissed claims and bring a new suit, which might result in the resubmission of the case to the Court of Appeals. In such a situation, the appellate court might be forced to analyze the legal significance of the same facts in two different cases. *Chappelle*, 84 F.3d at 654. As the Second Circuit put it:

> A plaintiff's attempt to appeal a prior adverse determination following the dismissal of his remaining claims without prejudice necessarily implicates the policies of the final judgment rule. Allowing such an appeal following a voluntary dismissal with prejudice . . . furthers the goal of judicial economy by permitting a plaintiff to forego litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.

> By contrast, because a dismissal without prejudice does not preclude another action on the same claims, a plaintiff who is permitted to appeal following a voluntary dismissal without prejudice will have secured an otherwise unavailable interlocutory appeal.

*Id.* (citations omitted).

The same risk of piecemeal litigation is simply not present in a case such as this one where the **prevailing** plaintiff voluntarily dismisses redundant legal theories without prejudice after receiving a favorable judgment. Such claims may or may not be reinstated if the district court judgment is reversed or vacated. If they are reinstated, however, they will be part of the same case that was appealed, thus eliminating any threat of piecemeal litigation. If the judgment for the plaintiff is affirmed, the voluntarily dismissed claims will remain moot and cannot be the basis for any new suits.

If there were only one rule for establishing appellate jurisdiction in all cases where a plaintiff voluntarily dismissed causes of action without prejudice, regardless of whether the plaintiff won or lost or whether it received complete relief, improper results would follow. Most importantly, the creation of a single rule would create a substantial opportunity for plaintiffs to manipulate procedure for the purpose of precluding appellate review of judgments favorable to them.

The Eleventh Circuit has recently considered the problem of having one rule for all cases in which a plaintiff voluntarily dismisses causes of action without prejudice, and it has confirmed the importance of having different jurisdictional rules for winning and losing plaintiffs who employ Rule 41(a)(2) before an appeal is taken. In *State*

*Treasurer v. Barry*, 168 F.3d 8 (11th Cir. 1999), a concurring opinion criticized the opinion in *Ryan* on the ground that *Ryan* could be interpreted to preclude appellate jurisdiction in **every** case where a plaintiff had voluntarily dismissed causes of action without prejudice, regardless of whether such plaintiff won or lost. The *Barry* concurrence was concerned that the application of this rule to prevailing plaintiffs could allow such plaintiffs to effectively oust an appellate court of jurisdiction to overturn the judgment favorable to them. As the concurring judge pointed out, a plaintiff could bring a complaint with two causes of action and one claim for relief, but one of the causes of action could be essentially meritless. Immediately after filing the complaint, and before the defendant could answer, the plaintiff could, of right, voluntarily dismiss the meritless cause of action without prejudice and proceed with the viable cause of action. If it prevailed, the plaintiff could then rely on the theoretical pendency of the dismissed claim to bar the defendant from appealing the judgment. *Barry*, 168 F.3d at 19.

The Eleventh Circuit acted quickly to prevent such an injustice. In *Schoenfeld v. Babbit*, 168 F.3d 1257, 1266 (11th Cir. 1999), decided approximately two weeks after *Barry*, the court held that "we read *Ryan* and its progeny to apply ***only*** when a plaintiff voluntarily dismisses its remaining claims without prejudice after a non-final ***adverse*** district court order has been entered" (emphasis added).

The Eleventh Circuit's discussion in *Schoenfeld* makes clear that the circuit split identified by Petitioners has no relevance to this case. Indeed, if Petitioners' succeeded in their attempt to apply an out-of-context rule to this case, they would create just such an unjust and improper procedural rule. While problems may arise when ***losing*** plaintiffs attempt to manufacture finality for adverse judgments, there is no

corresponding problem when an appellate court takes jurisdiction of a case where a plaintiff obtained all of the relief it sought and voluntarily dismissed redundant claims without prejudice. Indeed, as the *Barry* concurrence noted, a problem would arise in this latter situation only if the defendant were prevented from taking an immediate appeal.

## II. THE LOWER COURTS CORRECTLY RULED THAT PETITIONER'S CLAIM FOR COMMISSIONS WAS A MANDATORY COUNTERCLAIM IN THE FIRST FEDERAL ACTION.

Petitioner raises two arguments against the ruling that its claim for commissions was a compulsory counterclaim under Rule 13. First, it contends its claim for commissions did not arise from the same transaction as Respondents' claims in the first federal action and was therefore not "logically related to Respondents' claims." Second, it argues that its claim for commissions had not matured at the time of the first federal action and, therefore, could not have been fairly mandated. Both of these arguments are flatly contradicted by the facts of this case.

Petitioner makes its argument about the relationship between the claims by mischaracterizing the complaint in the first federal action. According to Petitioner, Ameritech and AMCI simply brought trademark claims in the first federal action, which alone would not be closely related to Petitioner's claim for commissions under the agency agreement. Although Ameritech and AMCI did bring a Lanham Act claim in the first federal action, their complaint also alleged that Petitioner and Mr. Siavrakas breached the agency agreement because of their post-expiration conduct. This claim was completely intertwined with Petitioner's claim

for commissions, which also involved Petitioner's post-expiration conduct. In fact, Ameritech and AMCI's contract claim and Petitioner's claim for commissions both relate to Petitioner's performance of the agency agreement, both before and after its expiration. This relationship amply demonstrates that the two claims have more than an adequate "logical relationship" and therefore fall within the ambit of Rule 13. *See Warshawsky & Co. v. Arcata Nat'l Corp.*, 552 F.2d 1257 (7th Cir. 1977) (holding that a claim for breach of contract and a claim for payments from the same contract were logically related).

Petitioner also misstates the procedural history of the case when it asserts that its claim for commissions had not matured at the time it filed its answer in the first federal action. **Petitioner had moved to file a counterclaim for those same commissions in a parallel state court case two months before it filed its answer in the first federal action.** Moreover, when the state court denied the motion to file the counterclaim, Respondents were willing to stipulate that Petitioner could file that claim in the first federal action. Petitioner failed or chose not to do so. Petitioner's claim for commissions was not included in the first federal action because Petitioner chose not to include them, not because they had not matured. There is simply no basis for Petitioners' argument that its mandatory counterclaims were not mature during the pendency of the first federal action.

## III. THIS CASE DOES NOT PROVIDE AN OCCASION FOR THE DEVELOPMENT OF THE DOCTRINE OF JUDICIAL ESTOPPEL.

As with its other arguments, Petitioner's argument regarding judicial estoppel is not supported by the law and or the facts of this case. First, Petitioner asserts that this Court

has not adequately developed the doctrine of judicial estoppel or established rules for its application by the federal courts. The doctrine, however, involves well-established principles of equity that have been extensively developed in the common law and that are recognized in the federal courts. The application of these principles is not problematic and it is regularly undertaken in the federal courts, including this Court. *See Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000) (noting that the doctrine prevents parties from relying on one argument to prevail in one phase of a case and then relying on a contrary argument to prevail in a later phase).

Second, Petitioner misstates the nature of Respondents' arguments below in an effort to suggest that the doctrine should apply here. Contrary to Petitioner's assertions, Respondents have not taken contrary positions in different phases of this case with respect to the question whether Petitioner's claim for commissions arises out of the same transaction or occurrence as Respondents' claims for breach of contract and for the violation of its trademark rights. In the first federal action, *Petitioner* contended that the district court should abstain from hearing the complaint because, under Michigan's rules of civil procedure, Ameritech and AMCI should be compelled to join their federal contract and trademark claims with their state-court claim and delivery action that was pending at the same time. In addressing this contention, the district court held that abstention would only be required if all of Respondents' claims were identical. Thus, in the first federal action, Respondents prevailed on the argument that their contract and trademark claims were not identical; they did not argue that the claims did not arise from the same transaction or occurrence. If anything, it is Petitioner who is adopting contrary arguments at different phases of the proceeding, first maintaining that the contract and trademark claims were identical and later insisting that

they did not arise from the same transaction or occurrence. Accordingly, Respondents have not taken any positions during the course of this litigation justifying the imposition of the extraordinary remedy of the application of the doctrine of judicial estoppel.

## CONCLUSION

Petitioner has failed to identify a single meritorious reason why this Court should take jurisdiction of this case. Petitioner purports to identify conflicts among courts or gaps in the law, where they simply do not exist. Moreover, even if such legal conflicts or gaps did exist, they are not presented by this case. In the end, the lower courts made the simple and indisputably correct ruling — that Petitioner's claim for commissions from the agency agreement should have been brought in conjunction with Respondents' claim for breach of the same agreement and that, because the claims were not joined, Petitioner lost the right to seek its commissions. There is no reason for this Court to disturb this ruling, and Respondents respectfully request that it deny the Petition.

Respectfully submitted,

/s/_____
DICKINSON WRIGHT PLLC
Kenneth J. McIntyre
*Counsel of Record*
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
(313) 223-3500

*Counsel for Respondents*